

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**T.W., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Houston, TX, Employer**

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**Docket No. 12-1126  
Issued: November 26, 2012**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

RICHARD J. DASCHBACH, Chief Judge  
PATRICIA HOWARD FITZGERALD, Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On April 30, 2012 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs (OWCP) dated November 22, 2011 concerning the termination of her wage-loss benefits. Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUE**

The issue is whether OWCP properly terminated appellant's wage-loss compensation benefits effective November 20, 2011 on the grounds that her disability due to her accepted condition had ceased.

**FACTUAL HISTORY**

This case has previously been before the Board. In an August 8, 2008 decision, the Board reversed a September 18, 2007 OWCP hearing representative's decision affirming a

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

January 23, 2007 OWCP decision terminating her wage-loss compensation. The Board found the opinion of Dr. Gary C. Freeman, a second opinion Board-certified orthopedic surgeon, was insufficient to support termination of appellant's compensation as his opinion was contrary to OWCP's statement of accepted facts. Dr. Freeman opined that appellant only suffered a soft tissue injury which was contrary to OWCP's acceptance of cervical radiculopathy. The facts and circumstances of the Board's prior decision are incorporated by reference.<sup>2</sup>

In a January 14, 2010 report, Dr. Qaiser Yusuf, a treating physician, related that appellant sustained a neck injury in the performance of duty which has impacted her ability to work. Diagnoses included: C5-6 disc protrusion; arthritis at C4-5 and C5-6; fibromyalgia, anxiety; depression; and chronic pain with acute exacerbations. Dr. Yusuf recommended reducing appellant's work hours due to her current difficulty with working six hours per day.

In a March 26, 2011 report, Dr. Robert A. Fulford, a second opinion Board-certified orthopedic surgeon, concluded that appellant was capable of returning to full-duty work for eight hours per day with no restrictions. He diagnosed cachexia, neck pain and cervical degenerative disc disease. A physical examination revealed normal cervical and lumbar range of motion.

On July 6, 2011 OWCP referred appellant to Dr. Frank L. Barnes, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion between Drs. Fulford and Yusuf regarding her work capability. In a July 28, 2011 report, Dr. Barnes diagnosed brachial neuritis and radiculitis. A physical examination revealed no cervical atrophy, weak bilateral biceps reflexes, posterior neck tenderness, normal radial pulses, normal bilateral upper extremity muscle strength and normal sensory testing on light touch. Dr. Barnes stated that he concurred with Dr. Fulford's opinion that appellant was capable of performing her date-of-injury job as a mail handler. In support of this conclusion, he noted that there were no objective findings which showed that she was unable to perform the duties of this position due to her neck problems. In an attached work capacity evaluation form (OWCP-5c), Dr. Barnes noted that appellant had reached maximum medical improvement and was capable of performing her usual job with no restrictions.

On October 4, 2011 OWCP issued a notice proposing to terminate appellant's wage-loss compensation based on the opinion of Dr. Barnes, the impartial medical examiner.<sup>3</sup> Dr. Barnes concluded that she was capable of working eight hours per day as a mail handler with no restrictions.

In response to its proposal to terminate appellant's wage-loss compensation benefits, OWCP received medical evidence from Dr. Shivarajpur K. Ravi, appellant's treating Board-certified neurologist and pain medicine physician. In his October 4, 2011 response to OWCP's

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<sup>2</sup> On June 17, 2002 appellant, then a 35-year-old mail handler, filed a traumatic injury claim alleging that on that date she injured her neck and shoulders while lifting trays. She stopped work on June 18, 2002. OWCP accepted the claim for cervical radiculopathy and placed appellant on the periodic rolls for temporary total disability. On April 22, 2003 appellant accepted a modified job working four hours per day, which were subsequently increased to six hours per day.

<sup>3</sup> The Board notes that, following the November 21, 2011 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. §§ 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

May 1, 2011 letter and an October 21, 2011 report, Dr. Ravi disagreed with Dr. Fulford's opinion regarding appellant's work capability. He opined that appellant was totally disabled from working.

By decision dated November 22, 2011, OWCP finalized the termination of appellant's wage-loss compensation effective November 20, 2011.<sup>4</sup> It found that Dr. Barnes' opinion constituted the special weight of the evidence in finding appellant was no longer totally disabled from working.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>5</sup> Having determined that an employee has a disability causally related to her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>6</sup>

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>7</sup> When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.<sup>8</sup>

### **ANALYSIS**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective November 22, 2011. The accepted condition in this case is cervical radiculopathy. OWCP properly determined that a conflict in medical evidence had been created between the opinions of appellant's treating physician, Dr. Yusuf, and Dr. Fulford, an OWCP referral physician, regarding appellant's work capability. It referred appellant to Dr. Barnes, Board-certified in orthopedic surgery, for an impartial evaluation.

The Board, however, finds that the opinion of Dr. Barnes is not well rationalized or sufficient to represent the special weight of the medical evidence. OWCP provided the physician with a list of questions and asked that he provide objective support and medical rationale for his conclusions. In his July 28, 2011 report, Dr. Barnes' response to the questions presented by OWCP was quite brief. He repeated the question posed by OWCP and provided a conclusory

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<sup>4</sup> The Board notes that, following the November 22, 2011 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. See 20 C.F.R. § 501.2(c)(1); *M.B.*, *supra* note 3; *J.T.*, *supra* note 3; *G.G.*, *supra* note 3; *Donald R. Gervasi*, *supra* note 3; *Rosemary A. Kayes*, *supra* note 3.

<sup>5</sup> *T.F.*, 58 ECAB 128 (2006); *George A. Rodriguez*, 57 ECAB 224 (2005).

<sup>6</sup> *J.M.*, 58 ECAB 478 (2007); *Elaine Sneed*, 56 ECAB 373 (2005).

<sup>7</sup> 5 U.S.C. § 8123(a); see *T.C.*, Docket No. 08-2112 (issued June 12, 2009).

<sup>8</sup> *J.J.*, Docket No. 09-27 (issued February 10, 2009); *William C. Bush*, 40 ECAB 1064 (1989).

answer without any accompanying narrative explanation. Dr. Barnes did not refer to results on examination, the medical or factual history, the nature of the accepted conditions, or provide sufficient medical rationale to support his opinion that appellant was capable of performing the duties of her date-of-injury position. Because he did not fully explain the basis for his opinion, his July 28, 2011 report is of limited probative value. There is, therefore, an unresolved conflict in the medical opinion evidence regarding whether appellant continues to have residuals of her employment injuries. Therefore, OWCP did not meet its burden of proof to terminate her wage-loss compensation effective November 20, 2011.<sup>9</sup>

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective November 20, 2011.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 22, 2011 is reversed.

Issued: November 26, 2012  
Washington, DC

Richard J. Daschbach, Chief Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>9</sup> See *Elaine Sneed*, *supra* note 6.